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STATE OF ALABAMA
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Honorable John R. Cooper
Director, Alabama Department of Transportation
1409 Coliseum Boulevard
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Transportation Department – Public Works
Law – Joint Venture Agreements –
Competitive Bids

If the Alabama Department of Transportation determines that the failure to obtain approval to bid as a joint venture and omission of a contractor identification number assigned to the joint venture in the bid are minor irregularities not defeating the responsiveness of the lowest bidder, it may award the contract to that bidder.

Dear Mr. Cooper:

This opinion of the Attorney General is issued in response to your request.

QUESTION 1

Given that the co-venturers took several steps to establish and function as a joint venture, can the omissions be considered irregularities and the contract awarded?

FACTS AND ANALYSIS

Your request states that the Alabama Department of Transportation (“ALDOT”) advertised projects for constructing roadway improvements in Madison County estimated at fifty million dollars. You further state that a bid submitted by a joint venture was the low bidder. This Office understands that a

joint venture means multiple contractors or companies bidding on a project together. You further state that the bid at issue was submitted through ALDOT's Internet Bidding Service Provider. For this project, the joint venture did not request and receive approval to submit a bid as a joint venture. The joint venture had previously been approved and assigned a contractor identification number. It is the understanding of this Office that had the joint venture sought approval for this project, it would have been assigned the same number.

Your request states that the joint venture properly used a proposal that had been issued to one of the co-venturers to submit its bid. Only one co-venturer electronically signed the bid using that co-venturer's individual contract identification number. Such a number serves as the signature for an internet bid. This Office understands that this particular number was previously assigned for the co-venturer to bid on another project individually. The joint venture properly submitted a bid bond issued in its name and properly executed the federal aid-funded projects signature sheet.

ALDOT has promulgated rules governing competitive bidding. *Standard Specifications for Highway Construction* § 102 (2012). Section 102.06(a) states as follows: "If the joint venturer chooses to submit a bid utilizing the Department's approved Internet Bidding Service Provider[,] the joint venturer must request and receive approval for the joint venture. The joint venturer will be assigned a contractor identification number prior to the submittal of a bid." *Standard Specifications for Highway Construction* § 102.06(a) (2012). The proposal must be "signed by each co-venturer." *Id.* The signature must be in the form of an electronic signature. *Standard Specifications for Highway Construction* § 102.06(e) (2012).

The Public Works Law, codified in section 39-2-1, *et seq.*, of the Code of Alabama, controls all public works contracts that exceed \$50,000 and requires that such contracts be competitively bid. ALA. CODE §§ 39-2-1 to 39-2-14 (2012 & Supp. 2014). Section 39-2-6(a) provides, in part, as follows: "A responsive bidder is one who submits a bid that complies with the terms and conditions of the invitation to bids. ***Minor irregularities in the bid shall not defeat responsiveness.***" ALA. CODE § 39-2-6(a) (2012) (emphasis added).

Consistent with section 39-2-6(a), ALDOT promulgated section 102.07 on irregular proposals. *Standard Specifications for Highway Construction* § 102.07 (2012). Section 102.07(a) discusses the circumstances in which a proposal will be rejected, repeatedly stating that "[p]roposals will be considered irregular and ***may be rejected***, . . ." and "***may be rejected*** at any time prior to the execution of the contract by the Director." *Standard Specifications for Highway*

Construction § 102.07(a) (2012) (emphasis added). As you correctly point out, the section uses “may,” which is permissive, not mandatory. *Bowdoin Square, L.L.C. v. Winn-Dixie Montgomery, Inc.*, 873 So.2d 1091 (Ala. 2003).

Furthermore, it is well settled that awarding authorities may waive technical deficiencies and minor irregularities in bids under the Public Works Law, the Competitive Bid Law for state agencies [ALA. CODE § 41-16-20(a) (2013)], and the Competitive Bid Law for local agencies [ALA. CODE § 41-16-50 (2013)]. *Horne Wrecker Serv., Inc. v. City of Florence*, 567 So. 2d 1285 (Ala. 1990) (allowance of more time for all bidders to meet specifications when they had not done so at time bids were opened); *McCord Contract Floors, Inc. v. City of Dothan*, 492 So. 2d 996 (Ala. 1986) (letter of credit submitted instead of bond); *Townsend v. McCall*, 262 Ala. 554, 80 So. 2d 262 (1955) (bid submitted twenty minutes late but before bids were opened); opinions to Honorable Jim Byard, Jr., Director, Alabama Department of Economic and Community Affairs, dated October 22, 2013, A.G. No. 2014-011 (bond did not contain necessary signature); Honorable B. C. Seymour, Mayor, Town of Double Springs, dated September 17, 1997, A.G. No. 97-00281 (omission of category and expiration date of contractor’s license from outside of bid envelope); Ira L. Myers, M.D., State Health Officer, dated December 14, 1979, A.G. No. 80-00124 (date of completion incorrect in bid but correct in accepted contract).

Most recently, the *Byard* opinion emphasized that the question of a technicality or minor irregularity is an act of discretion, relying on *White v. McDonald Ford Tractor Co.*, 287 Ala. 77, 248 So. 2d 121 (1971). In *White*, the Alabama Supreme Court held as follows:

We think that State authorities should have discretion in determining who is the lowest responsible bidder. This discretion should not be interfered with by any court unless it is exercised arbitrarily or capriciously, or unless it is based upon a misconception of the law or upon ignorance through lack of inquiry or in violation of law or is the result of improper influence.

287 Ala. at 86, 248 So. 2d at 129. *See also, Townsend*. Ultimately, “[w]hether a failure to comply with the terms and conditions of the invitation to bid is only a minor irregularity is a factual determination to be made by the awarding authority.” *Seymour*, at 4.

CONCLUSION

If the Alabama Department of Transportation determines that the failure to obtain approval to bid as a joint venture and omission of a contractor identification number assigned to the joint venture in the bid are minor irregularities not defeating the responsiveness of the lowest bidder, it may award the contract to that bidder.

QUESTION 2

Under these circumstances, if the joint venture bid cannot be accepted, do the facts and circumstances support acceptance of the bid proposal of the individual contractor?

FACTS, ANALYSIS, AND CONCLUSION

In light of the answer to your first question, the answer to your second question is moot.

I hope this opinion answers your questions. If this Office can be of further assistance, please contact Ward Beeson of my staff.

Sincerely,

LUTHER STRANGE
Attorney General
By:

A handwritten signature in cursive script that reads "Brenda F. Smith".

BRENDA F. SMITH
Chief, Opinions Division

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